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No. 382

In the Supreme Court of the United States

OCTOBER TERM, 1964

WALTER E. BANTOM, JR., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the Court of Claims, No. 481–61 (Pet. App. 1), is not yet reported.

JURISDICTION

The judgment of the Court of Claims was entered on March 13, 1964. A timely motion for rehearing was denied on May 15, 1964. The petition for a writ of certiorari was filed on August 13, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

745-327—64

QUESTION PRESENTED

Whether the Court of Claims correctly ruled that petitioners were not entitled to recover overtime compensation under the Federal Employees Pay Act, 5 U.S.C. 911, because they had performed no substantial official duties during their lunch hour.

STATUTE INVOLVED

Section 201 of the Federal Employees Pay Act, 59 Stat. 296, as amended, 5 U.S.C. 911, provides in pertinent part:

> PAYMENT OF OVERTIME; RATES
>
> All hours of work officially ordered or approved in excess of forty hours in any administrative work-week performed by officers and employees to whom this subchapter applies shall be considered to be overtime work * * *.

STATEMENT

Petitioners, civilian security policemen employed by the Department of the Army at the Frankford Arsenal (in Philadelphia, Pennsylvania), brought this action in the Court of Claims to recover overtime pay under the Federal Employees Pay Act, 5 U.S.C. 911. They contend that a 30-minute period set aside by the Arsenal regulations was not in fact available to them and that they were entitled, therefore, to

compensation for an 8½-hour work shift instead of merely 8 hours.[1]

Under the Arsenal regulations, there was no fixed time for the lunch period, which might be taken by the men at different times on different days of the week (Pet. App. 17–18, F. 17).[2] Policemen were entitled to a 30-minute lunch period, during which they were free to go anywhere within the Arsenal. Cafeteria facilities were available during two of the three shifts, but most of the men preferred to bring their own lunches (Pet. App. 16–19, F. 21). Certain posts in the Arsenal required the constant presence of a policeman; those assigned to such posts could not leave until the arrival of relief. If, when lunch time arrived, the appointed relief man was otherwise occupied, the policemen on duty was free to call in and request a substitute. On rare occasions, a shortage

[1] In the court below, petitioners also claimed compensation for time spent at the Arsenal in changing into their uniforms prior to the official morning roll call. The Court of Claims properly held that those policemen who elected to change at the Arsenal, rather than to wear their uniforms to work, did so purely as a matter of personal choice, and were therefore not entitled to compensation for coming early. See *Baca* v. *United States*, 150 Ct. Cl. 70, 86. Petitioners apparently do not challenge that ruling in this Court.

[2] "Pet." refers to the Petition, "Pet. App." to the Appendix to the Petition, and "F." to the findings of fact by the Court of Claims.

of personnel or other emergency conditions made it impossible for a policeman to get away for lunch (Pet. App. 16–17, F. 16). A policeman who missed his lunch period as a result of work was entitled to overtime compensation or compensatory leave. At no time, however, did the Provost Marshal or his immediate subordinate, the Security Officer, receive any complaint that the policemen were not getting a full 30-minute lunch period (Pet. App. 19, F. 23, 24). While the policemen were subject to call during their lunch periods in the event of fire or other emergency, there was no evidence that the claimants actually performed any substantial work during those periods (Pet. App. 18, F. 19).

The Commissioner of the Court of Claims found, *inter alia,* that no substantial official duties were performed during the authorized lunch period and hence that no overtime compensation was due. The Court of Claims adopted the Commissioner's findings and recommendations.

ARGUMENT

The decisions of this Court recognize that an employee who is subject to call by his employer during his eating or sleeping hours is not necessarily entitled to compensation for this time under federal compensation laws analogous to the one involved here. *Armour & Co.* v. *Wantock,* 323 U.S. 126, 133: *Skidmore* v. *Swift & Co.,* 323 U.S. 134, 136–137. The test,

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[3] These cases arose under the Fair Labor Standards Act, 29 U.S.C. 201.

rather, is whether, during the period in question, the employee is required to perform duties, either active or inactive, which substantially interfere with the effective use of the time for his own purposes. "Whether time is spent predominantly for the employer's benefit or for the employee's is a question dependent upon all the circumstances of the case." *Armour, supra,* at 133. Since the *Armour* and *Skidmore* decisions, this Court has consistently declined to review lower court decisions dealing with the compensability of such time in varying factual situations. *E.g., General Electric Co.* v. *Porter,* 208 F. 2d 805 (C.A. 9), certiorari denied, 347 U.S. 951; *Glenn L. Martin Nebraska Co.* v. *Culkin,* 197 F. 2d 981 (C.A. 8), certiorari denied, 344 U.S. 866; *Bell* v. *Porter,* 159 F. 2d 117 (C.A. 7), certiorari denied, 330 U.S. 813; *Bowers* v. *Remington Rand,* 159 F. 2d 114 (C.A. 7), certiorari denied, 330 U.S. 843; *Rokey* v. *Day & Zimmermann,* 157 F. 2d 734 (C.A. 8), certiorari denied, 330 U.S. 842; *Sawyer* v. *United States,* 138 Ct. Cl. 152, certiorari denied, 355 U.S. 868; *Conn* v. *United States,* 107 Ct. Cl. 422, certiorari denied, 332 U.S. 757; *Armstrong* v. *United States,* 144 Ct. Cl. 659, certiorari denied, 361 U.S. 825; *Ahearn* v. *United States,* 151 Ct. Cl. 21, certiorari denied, 364 U.S. 932.

In the instant case, the Court of Claims weighed the evidence to determine whether the time for which compensation is claimed was "work" time or "free" time. It found, among other things, that each policeman was entitled by the applicable regulation to a 30-minute lunch period per duty shift; that for the

most part this regulation was complied with; that a 30-minute lunch period away from their post was generally available to the petitioners, who were free to utilize the time as they saw fit, within reasonable limitations; that the evidence does not disclose that petitioners performed substantial work during their lunch period; that responsible officials of the Arsenal had sound reason to believe that the regulation was being fully effectuated and made every reasonable effort to insure that the 30-minute period was available; and that any policeman prevented by work commitments from taking a lunch period was allowed appropriate overtime compensation or compensatory time-off (Pet. App. 7, 18, 19). Those findings, we submit, are fully supported by the record and are dispositive of this case.

Without explicitly challenging any of the above findings, petitioners nonetheless assert that they were "in a duty status" during the entire 8½ hour period of each work shift (Pet. 3). This assertion, however, begs the very factual question which is at issue. While petitioners do not define the term "duty status", they appear to have in mind the fact that they were not "permitted to remove their uniforms" or "take off their side arms" and were "subject to call for duty during this period of time" (Pet. 3). As we have noted, however, those factors are merely the beginning, not the end, of the factual inquiry; they do not in themselves transform into "work" time what would otherwise be "free" time. Insofar as petitioners claim to have been "on duty" in any other sense, they merely seek a redetermination of

the facts found against them by the Court of Claims.[4]

The decision below is not in conflict with that of any court of appeals or with any prior decision with the Court of Claims. In *Culkin* v. *Glenn L. Martin Nebraska Co.*, 97 F. Supp. 661 (D. Neb.), affirmed, 197 F. 2d 981 (C.A. 8), certiorari denied, 344 U.S. 866, upon which petitioners chiefly rely, the post guards were permitted to go only to the nearest cafeteria or smoking area during their lunch period (whereas petitioners here were free to go anywhere in the Arsenal); they were required, while in the cafeteria, to remain on the look-out for employees without badges; and "in many instances" they were not relieved of their posts and thus could take no lunch period at all. 97 F. Supp. 661, 669. Thus, it could fairly be concluded that the guards seeking compensation in *Culkin*, unlike petitioners here, were merely performing their regular duties during their lunch hour.

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[4] Petitioners attribute to the Court of Claims "a new theory of law," *i.e.*, that "an employer is relieved of responsibility for the payment of statutory wages where the employee does not complain of being short-changed" (Pet. 7). The Court of Claims, however, alluded to the employer's lack of notice only as a basis for concluding that any work that may have been performed by the policemen during their lunch periods was not "officially ordered or approved" (Pet. App. 7). This Court need not consider whether that factor, standing alone, would justify the conclusion that the time was non-compensable. For the court below found, not only that the employer was ignorant of any breach of the regulations, but also that the 30-minute lunch period guaranteed by the regulations was in fact generally available and that there was no evidence that petitioners performed any substantial duties, active or inactive, during those periods.

Albright v. *United States*, Ct. Cl. No. 263-61, decided April 5, 1963, a prior decision of the Court of Claims, is readily distinguishable. As the court below pointed out, in *Albright* there was no regulation setting aside a lunch period, and the evidence showed that it was necessary for the guards to eat "on the job at their assigned posts, that is, while walking a beat, sitting at a stationary post, or while riding in a vehicle on a patrol assignment." (Pet. App. 7).

In sum, this case presents a purely factual issue which the court below, on the basis of substantiated evidence, resolved against the petitioners. There is no conflict and no occasion for review by this Court. See *Graver Tank & Mfg. Co.* v. *Linde Air Products Co.*, 336 U.S. 271, 275.

CONCLUSION

For the reasons stated, we respectfully submit that the petition for a writ of certiorari should be denied.

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